

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Telephone Number Portability

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CC Docket No. 95-116

PETITION FOR RECONSIDERATION OR CLARIFICATION

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SUMMARY

The Commission established a rule requiring local exchange carriers (“LECs”) to provide Remote Call Forwarding, Flexible Direct Inward Dialing and comparable services (“RCF” and “DID”) that are intrastate functions to other carriers without also establishing a corresponding cost recovery mechanism. The Commission instead established cost recovery guidelines for these services that prohibit pricing of these services at any amount that is not “close to zero.” Application of the federal guidelines preempts state retaking authority and effectively requires LECs to provide intrastate services below cost at confiscatory levels. Application of the guidelines further unlawfully abrogates carrier agreements.

The Commission was without jurisdiction to depart from traditional cost-causation principles with respect to pricing for RCF and DID. These are intrastate services subject to state jurisdiction under the Communications Act of 1934. To the extent the Commission’s jurisdiction to compel these services arises out of the 1934 Act, there is no corresponding authority within that statute to abandon traditional cost-causation pricing principles. To the extent the Commission purports to find authority in the Telecommunications Act of 1996 to depart from cost causation in order to allocate costs in a competitively neutral manner, such allocation only applies to long-term database number portability (LNP), not to RCF and DID.

In any event, there is no basis in the law or in the record in this proceeding to support the Commission’s determination that “cost causation” and “competitive neutrality” are *prima facie* mutually exclusive. Neither is there sufficient evidence in the record to support a finding that an “each bears his own cost” approach to RCF and DID provision is competitively neutral. Finally, the cost recovery guidelines adopted by the Commission are vague and ambiguous.

The Commission based its aggressive LNP implementation schedule on the representation of four switch vendors. In doing so, the Commission did not consider a number of critical LNP pre-deployment, deployment and post-deployment processes and contingencies. In light of this, the Commission should increase the implementation interval for Phase I and Phase II LNP implementation from 90 to 180 days to ensure the integrity of the public switched network. The Commission should also clarify that LNP implementation within a desirable subset of switches within any metropolitan statistical area satisfies its LNP implementation requirements.

Because of the ongoing delay in selecting membership to the North American Numbering Council (“NANC”), and the rapid progress being made in the states toward establishing regional service management (“SMS”) databases to support LNP, the Commission should direct NANC to automatically approve any SMS regional database administrator selected by carriers prior to NANC selection of such an administrator. The Commission should also clarify that the NANC has authority over SMS database administration alone, and allow carriers to make their own arrangements with regard to service control points.

The Commission’s fourth LNP performance criterion is unrealistic and has the effect of eliminating potentially innovative and efficient LNP technologies. Accordingly, it should be eliminated. No LNP technology, specifically including, but not limited to Query On Release, should be eliminated absent demonstrated proof that its implementation would violate the Commission’s technical performance criteria. Finally, the Commission should clarify that all interexchange carriers must participate in 500/900 portability efforts prior to referring that issue to the Industry Numbering Committee for resolution.

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BellSouth Corporation and BellSouth Telecommunications, Inc., by counsel and pursuant to Part 1, Subpart C of the Commission's Rules, 47 C.F. R. § 1.429, petition the Commission for reconsideration of the final action in this proceeding.¹

The Commission’s “Transitional Measure” rule compels local exchange carriers (“LECs”) to provide intrastate functionalities to other carriers on request. *Number Portability Order*, B-7, to be codified at 47 C.F.R. § 52.7(a).² Rate setting for these intrastate functionalities have historically been outside federal jurisdiction. 47 U.S.C. § 152(b). In practice, rates for these

² This rule requires all LECs to provide Remote Call Forwarding (“RCF”), Flexible Direct Inward Dialing (“DID”), or any other “comparable and technically feasible method” of number portability (“transitional measures”) upon receipt of a specific request from another telecommunications carrier, until such time as the LEC implements a long-term database method for number portability (“LNP”).

functionalities have been set by state commissions and have enabled LECs to receive reasonable compensation for the provision of these functions. In this proceeding, however, the Commission failed to establish a cost recovery mechanism for its Transitional Measure rule and instead promulgated “guidelines” which it has interpreted in such a way that their application would preempt state intrastate ratemaking authority. *Number Portability Order*, B-7 - B-8, to be codified at 47 C.F.R. § 52.9, ¶ 133.³ By expressly prohibiting the payment by a carrier cost-causer or any Transitional Measure beneficiary of an amount that is not “close to zero,” the Commission has effectively abrogated carrier to carrier and has directed states to require LECs such as BellSouth to provide intrastate services below cost at confiscatory levels in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

³ The Commission states:

... When a facilities-based carrier that competes against an incumbent LEC for a customer, the incumbent LEC incurs no cost of number portability if it retains the customer. If the facilities-based carrier wins the customer, an incremental cost of number portability is generated. The share of this incremental cost borne by the new entrant that wins the customer cannot be so high as to put it an appreciable cost disadvantage relative to the cost the incumbent LEC would incur if it retained the customer. Thus, the incremental payment by the new entrant if it wins a customer would have to be close to zero, to approximate the incremental number portability cost borne by the incumbent LEC if it retains the customer. *Id.* at ¶ 133.

Nevertheless, the Commission determined that the costs of transitional measures are incurred solely by the LEC providing the service. *Id.* at 122.

A. The Commission's Attempt To Direct The States To Disregard Cost-Causative Principles When Pricing Intrastate Service Operates to Illegally Preempt State Authority As Well As To Abrogate And Impair LEC Contracts.

As the Commission notes, several states have previously adopted cost recovery mechanisms for Transitional Measures, including two in states in which BellSouth provides telephone exchange and exchange access service:

[I]n Florida, carriers have negotiated appropriate rates for currently available measures. The Louisiana PSC has adopted a two-tiered approach to negotiate an appropriate rate. If the parties cannot agree upon a rate, the PSC will determine the appropriate rate that can be charged by the forwarding carrier based on cost studies filed by the carriers. . . . *Id.* at ¶ 123.

These rates, although negotiated by BellSouth with other carriers as “appropriate” (to a point well below retail prices), *Id.*, and approved by the state commission, are not “close to zero.” *Id.* at 133. As demonstrated below, nothing in the Telecommunications Act of 1996⁴ alters the grant of exclusive jurisdiction to the states with respect to setting prices for intrastate functionalities in the Communications Act of 1934.⁵ To the extent the Commission seeks to undo the work done by state commissions, it is engaging in unnecessary and unlawful federal preemption. To the extent the Commission’s guidelines result in reopening and disrupting of BellSouth’s mutually negotiated agreements, they constitute an immediate and ongoing threat to, and an abrogation and impairment of, BellSouth’s mutually negotiated contracts with other carriers⁶ in violation of the Fifth and Fourteenth Amendments.

⁴ Pub. L. 104-104, 110 Stat. 56, enacted Feb. 8, 1996 (“1996 Act” or “Act”).

⁵ 47 U.S.C. §§ 151, 2(b).

⁶ Even assuming, for the sake of argument, that the Commission had jurisdiction, the Commission can only abrogate carrier contracts after a finding that the specific contract was contrary to the (Continued...)

B. The Commission Lacked Jurisdiction To Promulgate Cost Recovery Guidelines for Transitional Measures.

The Commission bases its jurisdiction to compel LEC provision of Transitional Measures on a three legged stool: section 251(b)(2) of the 1996 Act, *Number Portability Order* at ¶ 110; section 271(c)(2)B(xi) of the 1996 Act, *Id.* at ¶ 111; and sections 1 and 202 of the 1934 Act, independent of the 1996 Act. *Id.* at ¶ 112. The Commission bases its jurisdiction to direct states to deviate from cost causative rate setting for transitional measures on section 251(e)(2) of the 1996 Act alone. Thus, by the Commission's own findings, even if it had jurisdiction to compel LEC provision of transitional measures had the 1996 Act not been enacted, it would not have had any authority to depart from cost-causative pricing principles for Transitional Measures.⁷ *Id.* at ¶ 131. As shown below, however, neither section 251 nor section 271 constitute such a mandate with respect to Transitional Measures.

Congress, in section 251(b)(2) of the Act, imposed the duty on all LECs to provide Number Portability, not Transitional Measures. Congress only required that the costs of Number Portability, not the cost of Transitional Measures, be borne by all telecommunications carriers on a competitively neutral basis. 1996 Act, § 251(e)(2). The separate regulatory categories, and

public interest. No record exists to support such a finding nor was there any notice that the Commission was intending to abrogate these agreements. *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987)

⁷ To the extent the Commission bases its jurisdiction to require LECs to provide transitional measures on request on sections 1 and 202 of the Communications Act of 1934, it simply has no corresponding license under that statute to suspend its obligation to provide a concurrent and fully compensatory cost recovery mechanism for such service provisioning.

their separate definitions, for Transitional Measures and Long-Term Database Method make clear that Transitional Measures cannot have the same legal meaning as Number Portability or LNP.

As an initial matter, the Commission determined that Transitional Measures are unacceptable as an LNP solution because they fail to meet the performance criteria established by the Commission in order to ensure that LNP complies with the Act's definition of Number Portability set forth at section 153(30).⁸ *Number Portability Order* at ¶¶ 56, 115. The Commission adopted a separate rule in this proceeding which defines Transitional Measure as a method that allows one LEC to transfer telephone numbers from its network to the network of another telecommunications carrier, but does not comply with the performance criteria adopted by the Commission for LNP. *Id.* at B-4, to be codified at 47 C.F.R. § 52.1(t).⁹ In sum, long-term database method LNP is Number Portability as defined by the 1996 Act, Transitional Measure methods are not.

The Commission's reliance on section 271(c)(2)(B)(xi) of the 1996 Act¹⁰ as a statutory mandate to compel LEC provision of transitional measures is illogical and manifests a blatant

⁸ That definition, adopted by the Commission at 47 C.F.R. § 52.1(k), prohibits the "impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." The Commission guts this requirement by grafting section 251(b)(2)'s technical feasibility language onto the definition and dropping the non-impairment criterion from Congress's definition. *Number Portability Order* at ¶ 110. Congress meant what it said -- number portability is a method whereby service users are able to switch providers *without* impairment. If Congress had meant that definition to be elastic, it would have inserted the "technically feasible" language directly into section 153(30) rather than put it into section 251.

⁹ It is disingenuous, and an obvious jurisdictional grab, for the Commission to prohibit RCF and DID as a permanent solution but to also characterize them as meeting Congress's definition of Number Portability.

¹⁰ "Until the date by which the Commission issues regulations pursuant to Section 251 to require number portability, interim telecommunication number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of (Continued...)"

distortion of congressional intent to further an independent administrative agenda. The

Commission observes:

... There will necessarily be a significant time period between the adoption date of these rules and the availability of long-term number portability measures. Therefore, were the Commission to promulgate rules providing only for the provision of long-term number portability, during this time period the BOCs could satisfy the competitive checklist without providing *any form of number portability. This could be true even if they had been providing interim number portability pursuant to the checklist prior to the effective date of the Commission's regulations.* We do not believe Congress could have intended this result. *Number Portability Order* at ¶ 111 (emphasis added).

The same “significant time period” (17 months) which compels the Commission to mandate LEC provision of Transitional Measures is elsewhere described by the Commission as a “relatively short period” when it attempts to rationalize application of number portability cost allocation principles to Transitional Measures. *Id.* at ¶ 121. In any event, it defies logic to believe that a Bell operating company that desires to provide in-region, interLATA service would not read section 271 as requiring BOC provision of interim number portability through RCF and DID until the Commission mandated deployment of LNP beginning in October 1997. BellSouth agrees with the Commission that Congress could not have intended that the 11th point on the 14 point checklist should appear, disappear, then reappear 17 months later.¹¹ BellSouth disagrees that this

functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.”

¹¹ This absurd result is obtained by construing Congress’s “[u]ntil the date by which the Commission issues regulations pursuant to Section 251 to require number portability” language in section 271(c)(2)(B)(xi) as meaning that the obligation to provide interim portability ceases on July 2, 1996, the date the Commission issued its order, rather than October 1, 1997, the date the Commission’s regulations require LNP to be provided. If the Commission were seriously concerned that BOCs would read section 271(c)(2)(B)(xi) as a statutory loophole, and in response required mandatory LEC provision of transitional measures to close this BOC loophole, (Continued...)

interpretation grants the Commission the authority to graft section 271(c)(2)(B)(xi), applicable to BOCs who desire to get into the long distance business, onto sections 251(b)(2) and 153(30), which apply to all LECs. Rather, the Commission should interpret 271(c)(2)(B)(xi) as common sense dictates: a continuing requirement that certain BOCs are to provide interim telecommunications number portability under Section 271 until they, together with all other LECs, are required to deploy section 251(b)(2) LNP in October 1997.

Assuming *arguendo* that the Commission has authority to apply section 251(e)(2)'s cost allocation provisions to transitional measures, its findings are arbitrary and capricious and unsupported in the record. The Commission jettisons cost causation out of hand without any meaningful explanation, and attributes its decision to a Congressional directive that appears nowhere in the Act or its legislative history. *Number Portability Order* at ¶ 131 (“With respect to number portability, Congress has directed that we depart from cost causation principles if necessary in order to adopt a ‘competitively neutral’ standard, because number portability is a network function that is required for a carrier to compete with the carrier that is already serving a customer.”) There is no express or implied Congressional finding, in the Act or in its legislative history, that “number portability is a network function that is required for a carrier to compete with the carrier that is already serving a customer.” The Commission itself stopped short of making any such determination on the record. *Id.* at ¶ 31. Indeed, the issue of competitive neutrality is addressed *en toto* (without any reference to the Commission) in the legislative history as follows:

why, then, when it adopted its definition of “Transitional Measure,” did it not include section 271(c)(2)(B)(xi)’s “minimal impairment” requirement in the definition of Transitional Measure?

[T]he costs for [sic] numbering administration and number portability shall be borne by all providers [sic] on a competitively neutral basis. Telecommunications Act of 1996, Law & Legislative History at CR-122 (Pike & Fisher 1996).

The “reasons” the Commission cites for its determining that “cost causation” and “competitively neutral” are *prima facie* mutually exclusive have no basis in the law or in the record

In its “examples to clarify and illustrate” its cost recovery criteria, the Commission purports to guarantee that no new entrant in local exchange markets will (1) have to pay an amount higher than close to zero when it requests Transitional Measures for which incumbent LECs will incur all the costs (§ 133); and (2) even if all costs are borne equally by all carriers, no new entrant will have to pay its share of costs if “the new entrant’s share of the cost [is] so large, relative to its expected profits, that the entrant would decide not to enter the market.” *Id.* at § 135. The Commission has not explained why, having itself determined that the costs of transitional measures will primarily be born by all incumbent LECs, the allocation schemes required to ensure the Commission’s guarantees of profitability to new entrants over the next 17 months will not operate to the competitive disadvantage of incumbent LECs. Nor has the Commission explained how such allocation mechanisms, which will essentially require incumbent LECs to pay for their competitors’ legitimate business costs of entry, can possibly comport with any rational notion of “competitive neutrality.”

There is simply no express or implied Congressional directive to the Commission, in the Act or in its legislative history, to “depart from cost causation principles, if necessary.” In fact, an element of cost causation is implicit in the concept of long-term database portability, insofar as all carriers are expected to incur shared costs in the creation of databases and their administration.

Id. at ¶¶ 212-220. Yet the Commission purports to find a “statutory mandate” not “to price number portability on a cost causative basis.” *Id.* at ¶ 131. This is clear error.

Moreover, it was arbitrary, capricious and clear error for the Commission to adopt its competitively neutral cost recovery principles for transitional measures in order to “create incentives for LECs, both incumbents and new entrants, to implement long-term portability at the earliest possible date. . .” *Number Portability Order* at ¶ 125. The Commission established a long-term portability phased deployment implementation schedule that it believes “is in the public interest and supported by the record.” *Id.* at ¶¶ 77-82 (quote at ¶ 82). Having established a regulation that requires implementation of long term portability beginning in October 1997, and finding that schedule to be in the public interest and supported by the record, it is wholly arbitrary and capricious for the Commission to attempt to force an earlier implementation schedule through imposition of a punitive cost recovery mechanism that does not allow for complete cost recovery.

Likewise, having determined that the costs of providing Transitional Measures will be incurred solely by the incumbent LEC network, *Id.* at ¶ 122, it was arbitrary, capricious, and clear error for the Commission to determine that a mechanism that requires each carrier to pay for its own costs of currently available number portability measures would be competitively neutral. *Id.* at ¶ 136. The result of such a mechanism would be to preclude LECs from recovering any of their legitimate costs in providing transitional measures.

Finally the Transitional Measure cost recovery guidelines are vague and ambiguous. These guidelines provide that:

Any cost recovery mechanism for the provision of number portability pursuant to section 52.7(a) of this chapter, 47 C.F.R. § 52.7(a), that is *adopted by a state commission* must not:

(1) give one telecommunications carrier an appreciable, incremental cost advantage over another telecommunications carrier, when competing for a specific

subscriber (i.e., the recovery mechanism, may not have a disparate effect on the incremental costs of competing carriers seeking to serve the same customer); or (2) have a disparate effect on the ability of competing telecommunications carriers to earn a normal return on their investment.

Both principles are “suggested” (§ 132) by an agency “interpretation” (§ 132) which “reflects the belief” in an “intent” ascribed to Congress (§ 131). From this ephemeral etiology spring forth two full-fledged cost recovery “criteria” unfettered by any basis in law, free market economics or logic (although the Commission, having first derived the principles from thin air, takes pains to illustrate to states how they are to price such services in a way that will result in LEC subsidization of a new entrant’s legitimate costs of entry. This is far from competitive neutrality). Important terms are left undefined: what is an “appreciable cost advantage?” (something little more than zero?) What is a “normal return”? Although the Commission adopted 20 definitional terms in its new number portability regulations; none of them define operative terms in its Transitional Measure cost recovery guidelines.

II. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO REQUIRE THAT AREAS WITH POPULATIONS GREATER THAN ONE MILLION BE IMPLEMENTED IN ONLY 90 DAYS, AND CLARIFY THE SCOPE OF LNP IMPLEMENTATION WITH RESPECT TO THE NUMBER OF SWITCHES.

The Commission adopted a rule requiring all LECs to implement LNP by December 31, 1998, in the 100 largest Metropolitan Statistical Areas (“MSAs”) in a five part phased deployment that allows only 90 days to implement each MSA. *Number Portability Order*, B-5, B-10 -11, to be codified at 47 C.F.R. §§ 52.3(b), App. A to Part 52. According to this schedule, BellSouth must implement the largest MSA in its region, Atlanta (approximate population 3.3 million), in 90 days during Phase I (10/97-12/97); and the next three largest MSAs, all in Florida (combined

approximate population 4.8 million), in 90 days during Phase II (1/98-3/98).¹² For the reasons discussed below, the Commission should extend the LNP implementation interval for Phase I and Phase II from 90 to 180 days. BellSouth further urges the Commission to clarify that its implementation schedule will be satisfied even if LNP is not deployed across every switch within and MSA.

The Commission has established an implementation schedule without full consideration of all the factors necessary to do so. Specifically, the Commission only considered vendor projections of availability of LRN software.¹³ It expressly assumed that there will be no significant problems in software development that will affect such vendor projections. *Id.* at ¶ 78. In failing to consider other LEC implementation factors it implicitly assumed that all LEC switches will have installed the appropriate generic switch software to support the LRN releases. Equally implicit is the apparent belief that all LECs have the same resources to implement individual MSAs completely in three month intervals. The Commission appears to believe that providing LNP is simply a matter of loading LRN software into LEC switches. There is no basis in the record to support these assumptions, or a uniform three month per MSA implementation across all deployment phases.

¹² The next four largest MSAs, spread across four separate states (combined approximate population 4.7 million), in 90 days during Phase III (3/98-6/98); the next five largest MSAs, spread across four states (approximate combined population 4.9 million), in 90 days during Phase IV (6/98-9/98); and the next seven largest MSAs, spread across five states (combined approximate population 4 million), in 90 days during Phase V (9/98-12/98). *Id.*, see also D-1 -2, App. D to Part 52.

¹³ The Commission expressly acknowledged that its schedule is consistent with the proposed schedule of one new entrant, AT&T and the estimates of four switch vendors, Lucent, Nortel, Siemens Stromberg-Carlson and Ericsson. *Id.* at ¶¶ 77, 78.

Each RBOC region is populated with a variety of switches, including multiple models from multiple manufactures, within MSAs. Each different switch type has its own operating software ("generic"). As illustration, BellSouth has deployed a number of AT&T (Lucent) 5ESS switches in its region. All of these switches are loaded with generic 5E-9.1 or generic 5E-10. Neither generic will support LRN software. Instead, these switches will have to be upgraded to a generic 5E-11 which is not yet available from the vendor.

In order to protect the integrity, quality and reliability of the public switched telephone network ("PSTN"), BellSouth conducts preinstallation lab testing of new generics in order to find any defects in the software prior to field installation. Defects found during this process can cause deployment delays.¹⁴ BellSouth next conducts soak tests for the new software in a live switch. In this process, a new generic is loaded in a single small (in terms of access lines) switch and soaked for up to 30 days. BellSouth then proceeds with a gradual ramp up, starting with small switches and working up to a large FCC reportable switch. After this process is completed, the generic is available for general deployment in BellSouth. Live switch soak tests are used to identify defects previously undetected during lab testing. Defects found during this process can also cause deployment delays.

Once a generic is generally accepted in BellSouth, every switch generic upgrade undergoes a stabilizing period subsequent to load complete. This period, which applies before new capabilities (such as LRN) available on a given generic can be activate, can range from one week or longer depending upon software complexity. By failing to account for these processes,

¹⁴ The vendor then develops "patches" to be loaded into BellSouth's lab switch. At general availability the vendor incorporates these patches into the production version of the software.

which apply to the varied switch and generic software topography across LECs, as well as to the anticipated LRN releases,¹⁵ the Commission has established an implementation schedule that is inconsistent with protecting the integrity of the PSTN, and with the Commission's own non-degradation performance criteria.

In addition to necessary switch upgrades, the Commission failed to take into account that deployment of workable LNP must be scheduled and coordinated with other fundamental and essential LNP efforts. The Commission cites Georgia's implementation schedule for number portability in support of the implementation schedule it established in this proceeding. *Id.* at ¶¶ 22, 67. Yet the *Selection Committee Report to the Georgia Public Service Commission* identifies four major work efforts that must be scheduled and coordinated for the successful completion of a database number portability solution: the availability of switch vendor functionality; the availability of a neutral third party service management system ("SMS"); the availability of participating telecommunications service provider service control point ("SCP") and SMS functionality; and the availability of participating telecommunications service provider internal operational support systems ("OSS"), billing systems and associated methods and procedures. The Commission failed to recognize and account for these crucial elements of an LNP solution when it established its implementation schedule for number portability. The Selection Committee Report from the Georgia Workshop, on the other hand, has determined that in order to meet the

¹⁵ In addition to software upgrades, the Commission has not considered the effect of necessary hardware upgrades required to support long-term database methods of number portability. For example, BellSouth estimates that approximately 85% of its Nortel DMS family of switches will require switch processor upgrades in order to support LRN.

LRN deployment schedule, all internal OSS, billing systems and operational planning needs to be completed by May, 1997.¹⁶

A. LNP Deployment In Compliance With The Commission's Implementation Schedule Does Not Mandate That Every Switch Within An MSA Be Activated Within The Relevant Implementation Phase.

In establishing its implementation schedule requiring that the top MSAs be completely implemented in three month intervals, the Commission overlooked the proposal put forth by AT&T in its comments, and agreed to by participants in the Georgia Number Portability Workshop, that LRN be deployed in a desirable subset of total switches within an MSA. Such deployment is necessary in order to conduct systematic testing that will ensure that the quality, reliability and convenience of the PTSN is not unreasonably impaired. In March of this year, AT&T proposed that LRN be deployed "in 20 to 25 switches in each market (20 for the incumbent and at least 1 for each alternative carrier)." AT&T, *ex parte*, CC Docket 95-116 at 8 (Mar. 29, 1996). Similarly, carriers participating in the Georgia Number Portability Workshops agreed to deploy LRN in the 21 most desirable (as determined by the competing service providers) switches within the Atlanta MSA. The actual number of switches should be determined by the carriers, under the supervision of the SMS administrator.

Such limited deployment is consistent with sound network engineering principles, as well as the Commission's efforts to target deployment in those areas where competing service providers are likely to offer alternative services. *Number Portability Order* at ¶ 82. It is consistent, as well, with the 1996 Act's qualification to LEC provision of LNP "to the extent

¹⁶ Testing for these processes has been mandated a part of the Illinois Number Portability field test. However, results will not be available until well after the May 1997 ready date. *Infra*, n.17.

technically feasible.” 1996 Act, § 251(b)(2). Just as it is inappropriate to flashcut LNP nationally, it would be inappropriate to require simultaneous deployment in all switches within the largest MSAs. *Cf. Number Portability Order* at ¶¶ 70, 81. Large MSAs, such as Atlanta, encompass thinly populated suburban and rural areas in which competing service providers are not as likely to offer alternative services as in more concentrated urban and suburban areas. A simultaneous, MSA-wide switch deployment in MSAs would not allow BellSouth the opportunity to conduct necessary testing to ensure network integrity, is unnecessary, and is a recipe for disaster.

The Commission should therefore reconsider its requirement that carriers complete implementation of LNP during Phase I and Phase II in only 90 days.¹⁷ Deployment of such a potentially convulsive change to the PTSN in the largest MSAs should be done expeditiously, but cautiously. An additional 90 days will allow for appropriate preparation and testing, and enable LECs to more efficiently complete later deployments. The Commission should also clarify that initial deployment of a desirable subset of the MSAs total switches comports with the Commission’s implementation schedule. LECs must still have the opportunity to seek a waiver from the modified implementation schedule pursuant to the rules established by the Commission. *Id.* at ¶ B-5, § 52.3(e).

III. THE COMMISSION SHOULD NOT ALLOW THE CONTINUING DELAYS IN ESTABLISHING NORTH AMERICAN NUMBERING COUNCIL

¹⁷ The Commission should also clarify that Phase I implementation may actually begin at any time during the Phase I installation period. This is necessary if a LEC is to make any meaningful use of the field test results of the Illinois Local Number Portability Workshop, which are to be filed with the Commission on the last day of third quarter of 1997. *Id.* at B-6, to be codified 47 C.F.R. § 52.3(g).

MEMBERSHIP TO DELAY DEVELOPMENT OF REGIONAL SMS DATABASES.

The Commission adopted rules that enable the North American Numbering Council (“NANC”) to direct establishment of a system of regional SMS databases. *Number Portability Order*, B-6, to be codified at 47 C.F.R. § 52.5(a). These regional databases are to be administered by entities selected by NANC within seven months of NANC’s initial meeting. *Id.* at § 52.5(c). The difficulty with this plan is that NANC membership has yet to be selected, NANC’s first meeting has yet to be scheduled, and LECs must deploy LNP in the largest MSA in each BOC region in only 17 months. Even if NANC members were appointed and the first meeting convened before the pleading cycle in the Commission’s pending number portability docket closed, it is conceivable that NANC-appointed SMS administrators would have less than a few months to discharge their prescribed obligations.¹⁸

In the meantime, participants in the Georgia Local Number Portability Steering Committee have already formed a limited liability company (“GA NAPC”), and the GA NAPC’s Operating Agreement is being circulated among prospective members for signature. The Georgia Steering Committee is also currently in the process of finalizing, and plans to soon release, a request for proposal for an SMS administrator. Further, the Florida Public Service Commission’s Florida Number Portability Task Force, concerned about the timely development of the NANC LNP SMS databases, has contacted the Georgia Public Service Commission about working together to

¹⁸ The NANC-appointed local LNP administrator(s) (“LNPA(s)”) are to determine, *inter alia*, technical interoperability and operational standards, the user interface between telecommunications carriers and the LNPA(s), the network interface between the SMS and the downstream databases, and the technical specifications for the regional databases. *Id.* at § 52.5(d).

develop a regional database, and then presenting this work effort to the NANC for acceptance as the database for the southeast region.

The *Number Portability Order*, while allowing individual state opt-outs based on the selection of a state SMS administrator prior to July 2, 1996, does not appear to address the fact that carriers may proceed to implement regional database LNP solutions prior to NANC selection of the LNPA. In order for BellSouth to have any realistic chance to implement LNP on schedule, efforts must proceed apace with respect to the creation of a region-wide SMS database based on the work performed to date by GA NANC. These efforts cannot be stalled because of the continuing delay with respect to the selection of NANC membership. The Commission should therefore clarify that NANC will automatically approve any regional SMS database administrator selected through a competitive bidding process by industry participants prior to the selection of a NANC-appointed LNPA, subject to the administrator's continuing adherence and compliance with NANC SMS database administration specifications. In the alternative, the Commission should clarify that any regional SMS administrator selected through a competitive bidding process by industry participants prior to the selection of a NANC-appointed LNPA may be granted a waiver from any LNPA application or certification process developed by NANC, subject to the administrator's continuing adherence and compliance with NANC database administration specifications.

The Commission should further clarify that the NANC should address SMS functionality only. In order to comply with the LNP implementation schedule, carriers must begin the process of selection an SCP vendor, or make arrangements to otherwise obtain SCP functionality, immediately. Individual carriers will have unique SCP requirements. Each carrier must have the

exclusive authority to select the SCP component of its own call processing network. BellSouth is concerned that, in light of the broad duties granted NANC-appointed LNPAs, *supra* n.4, and the definition of *regional database* in the Commission's rules to include "an SMS/SCP pair," *Id.* at B-3, §52.1(l), a NANC-appointed LNPA may attempt to select and contract with an SCP vendor that would have no accountability to a carrier, and particularly to LECs, for any problems in call processing. The Commission should therefore clarify that NANC should only address SMS, and not SCP, functionality. This is similar to the current situation with respect to 800/888 service, in which there is a single central SMS database but each service provider selects its own SCP to be used for live call processing.

Finally, the Commission should reconsider its authorization that the NANC determine the requirements for the interfaces between the SMS and down stream databases. *Number Portability Order*, B-6, to be codified at 47 C.F.R. § 52.5(d). As the Commission states elsewhere in its Order, the fundamental purpose of the NANC is to act as an oversight committee with the technical and operational expertise to advise the Commission on numbering issues. *Id.* at ¶ 93. Industry participants, and specifically the carriers sharing in the costs of developing, establishing and maintaining the regional databases, are the appropriate parties to determine such technical interface requirements, subject to NANC oversight and management.

IV. THE COMMISSION SHOULD RECONSIDER AND ELIMINATE ITS FOURTH LNP PERFORMANCE CRITERION OR, IN THE ALTERNATIVE, RECONSIDER ITS DECISION TO BAN ANY LNP TECHNOLOGY.

Rather than choosing a particular LNP technology or a specific LNP architecture, the Commission, "in order to better serve the public interest," adopted a rule establishing nine

performance criteria for LNP deployment. *Number Portability Order*, ¶ 46; B-4 -5 (to be codified at 47 C.F.R. § 47.52.3). The fourth criterion provides that LECs must provide LNP that:

- (4) does not require telecommunications carriers to rely on databases, other network facilities, or services provided by other telecommunications carriers in order to route calls to the proper termination point;

Number Portability Order, B-4, to be codified at 47 C.F.R. §§ 52.3(a)(4). This criterion is unrealistic, is not a true performance criterion, and violates the Commission's proscription against technology foreclosure.¹⁹ It should therefore be eliminated.

Perhaps, in the best of all worlds, carriers should not be required to rely on the databases, network facilities and services of other carriers in order to route calls to the proper termination point. BellSouth rather suspects that such a world would be characterized by redundancy and inefficiency. In any event, the Commission's fourth criterion is unrealistic in the immediate, multiple carrier competitive environment. In such an environment there will always be calls which, in order to be completed, must traverse other carriers' networks. The fourth criterion will always be impossible to achieve because carriers receiving ported numbers will always be dependent upon other carriers' databases, services and network facilities. Specifically, just as in today's non-LNP environment, some carriers will always be dependent upon other carriers' ability to take proper measures to determine routing information as well as to physically route calls to the interconnection point. A criterion that is impossible to meet should be eliminated.

¹⁹ The Commission determined that none of the current carrier-supported LNP methods, including LRN, has been tested or described in sufficient detail to permit the selection of a particular LNP architecture without further delay. *Id.* at ¶ 46. Dictating implementation of a particular LNP method, observed the Commission, "could foreclose the ability of carriers to improve on those methods already being deployed or to implement hybrid (but compatible) methods." *Id.*

Each of the Commission's other criteria (with the exception of the seventh, which prohibits proprietary interests) address technical performance issues: supporting network services, features and capabilities; efficient use of numbers; preventing number changes; service quality and network reliability; engineering for other types of portability; and consideration of potential impacts on networks outside the area of LNP deployment. Criteria four and seven are better characterized as "competitive criteria." The fourth criterion purports to eliminate a "differential in efficiency" which the Commission assumes will result because queries will be performed only when calls are to be ported.²⁰ *Id.* at ¶ 53. Having already determined that none of the current LNP methods has been tested or described in sufficient detail to permit the selection of a particular architecture, however, *Id.* at ¶ 46, the Commission could not have had before it the facts necessary to determine that such a "differential in efficiency" will actually and inevitably occur, much less result in any illegitimate competitive disadvantage, whenever one carrier's databases, facilities or services are used to route another carrier's calls.

By focusing on hypothetical competitive consequences rather than actual performance issues, the Commission's fourth criteria actually violates the Commission's own basis for promulgating LNP performance criteria in the first place: to avoid "dictating implementation of a particular method," *Id.*, and to maintain "flexibility to accommodate innovation and improvement," *Id.* at ¶ 47, in light of the insufficient state of LNP testing and description. *Id.* at ¶ 46. By the Commission's own acknowledgment, however, the fourth criterion precludes LEC

²⁰ The Commission states that "dependence on the original service provider's network to provide services to a customer that has switched carriers contravenes the choice made by that customer to change service providers." *Id.* This is mere speculation, has no basis in the record, makes no sense when applied to non-facilities based resellers, and begs common sense in any event.

implementation of a particular method of technology: the Query on Release (“QOR”) call processing solution.²¹ As preclusion of QOR (and, perhaps, any other as yet undiscovered or undeveloped technologies which may, to some extent, rely on other carriers’ networks, facilities or services) hampers the efficient LEC deployment of LNP, and thus eliminates a possible source of innovation and improvement, the Commission should reconsider and eliminate its fourth criterion.²²

For the foregoing reasons, the Commission should eliminate its fourth criterion. This would permit LECs to experiment with QOR and other potential technologies, and not call into question the use of LRN, which itself requires some reliance on other carriers networks. In the alternative, the Commission could clarify that QOR or any other LNP technology may be implemented until it can be demonstrated that such implementation actually produces an anticompetitive result or violates any of the Commission’s performance criteria. Specifically, the Commission should clarify that QOR may be implemented, subject to these conditions, within a

²¹ QOR is an enhancement or adjunct to LRN that increases LRN’s efficiency and makes it more economical, especially when the percentage of ported numbers in any given NXX is relatively low. In a QOR scenario, once a call is placed to a number in a portable NXX, the originating switch attempts to route the call to the donor switch by sending a call setup message across the SS7 signaling network. A voice path is not established unless the number is actually resident on the donor switch. If the number has ported, the donor switch sends a release message back to the originating switch indicating that it must initiate a query to determine the LRN in order to route the call.

²² To the extent that this criterion was adopted to facilitate deployment of LRN, and to prevent the permanent adoption of current local exchange carrier (“LEC”) services such as RCF and DID, its repeal will not result in an argument that transitional Measures can serve as LNP. RCF and DID have been disqualified as failing to meet two performance criteria: criterion two (efficient use of numbers) and criterion five (non-degradation). LECs should be allowed to experiment with various triggering mechanisms, and QOR should be precluded only if it demonstrated to violate a genuine performance criteria.